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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, a corporation, JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, *Petitioners*

v.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIR LINE RAILROAD COMPANY, a corporation, *Respondents*

MOTION OF SOUTHERN GOVERNORS' CONFERENCE AND SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICI CURIAE

**BRIEF OF STATE OF GEORGIA
GEORGIA PUBLIC SERVICE COMMISSION
SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS
SOUTHERN GOVERNORS' CONFERENCE
AS AMICI CURIAE**

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Come now Southern Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners and file this motion for leave to file jointly with the State of Georgia and Georgia Public Service Commission a brief amici curiae in this proceeding and state:

The Southern Governors' Conference is a 16 state organization composed of the ten southeastern states, three eastern border states and three southwestern states. In freight rate matters it has traditionally represented only the ten southeastern states. (In this proceeding it does not represent Alabama.)

The Southeastern Association of Railroad and Utilities Commissioners is an organization of the same southeastern states working with and implementing the policies of the Southern Governors' Conference with respect to transportation matters.

Both Southern Governors' Conference and Southeastern Association have appeared in the proceeding before the Interstate Commerce Commission and before the lower Courts in support of the respondent railroads.

These parties represent the broad public interest of producers, processors and consumers in the South and desire to file a brief directed toward that facet of the proceedng; it is felt neither petitioners nor respondents would adequately or properly represent the broad interests of the Southern Governors' Conference and the Southeastern Association.

Leave is therefore sought to file the attached brief. This motion dated at Atlanta, Ga., this twenty-seventh day of December, 1962.

Respectfully submitted,

SOUTHERN GOVERNORS CONFERENCE
SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

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Interest of These Parties

The State of Georgia, Georgia Public Service Commission, Southeastern Association of Railroad and Utilities Commissioners and Southern Governors' Conference file this brief in order that the Court may be aware of the broad interest of producers, processors and consumers in the South as contrasted with the narrow interests of the competing carriers and the few

large grain handling concerns (R. 39) who for the past few years have enjoyed an artificial advantage in the transportation and merchandising of grain because of the absence of a fair and reasonable level of railroad rates on grain moving to the South.

The parties to this brief have, for the past 25 years, actively endeavored, with a fair measure of success, to obtain reasonable freight rates from, to and within the South (R. 31). Their efforts have not been made in behalf of any specific segment of the South's economy, nor on behalf of any particular mode of transportation. These parties have, from time to time, supported the positions of both water carriers and railroads, governed always by what we consider to be in the best interests of the over-all public in the South.

The South has always been a deficit area for grain and in recent years, coincident with the development of a major livestock and poultry industry in the South, the consumption of grain has increased tremendously requiring importation from other territories of vastly increased quantities of grain (R. 18). For the past several years, these parties have worked diligently to secure relief for the people of the South from the inordinately high level of rates on grain.[1] The South-

[1] The present basic level of rail rates on grain to and within the South was approved by the Interstate Commerce Commission in Grain To, From, and Within Southern Territory. In a separate opinion, Commissioner Splawn said,

> "We are leaving all rates within the Southeast on an exceptionally high level, and that level will remain a controlling factor in making interterritorial rates to the Southeast. It is true that there was no widespread objection from the South against this unusually high rate level on grain. There was no one representing the general public, such as State officials, who appeared in protest to the general body of rates on this basic agricultural commodity." 259 ICC 629 at 789 (1945)

eastern Association is title plaintiff in a major complaint case, seeking lower rates on grain, which has been pending before the Interstate Commerce Commission since 1955.[2]

Unrealistically high railroad rates have diverted the preponderance of the grain movement to unregulated transport, mostly gypsy truckers (R. 19).

This unregulated movement of grain has decentralized the milling industry, disrupted historical grain marketing patterns, created uncertainty and bred inequities between various grain utilizing areas in the South.

The Southern Railway developed new methods for the transportation of grain including radically different equipment and new concepts of pricing (R. 15-18) which would be of great benefit to the vast majority of southern grain producers, processors and consumers and to the general public. When the rates were suspended by the Interstate Commerce Commission, these parties participated extensively in the proceeding before that Commission in support of Southern Railway.

The southern States support the suspended rates not only because they will provide needed and long overdue relief to the southern consumers of grain, but also because they will bring stability to the marketing of grain in the South and because they afford equitable treatment to people and places all over the South. The rates are made on basis of a scale providing rate parity to all locations and are not made on a point to

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[2] Docket 31874, Southeastern Association of Railroad and Utilities Commissioners, et al. v. Atchison, Topeko and Santa Fe Railway, *et al.*

point basis to meet or—as is alleged—to destroy water competition.

Every day the effectiveness of these rates is delayed results in irreparable damage to thousands of southern producers and processors, and millions of southern consumers. (R. 31-32). If this Court should conclude these rates might further be enjoined, then further irreparable damage will be done to the general public in the southern States.

Argument

We think the lower court is correct in finding that the plain words of Section 15(7) of the Interstate Commerce Act that at the end of the suspension period prescribed by Congress, the rates ". . . shall go into effect . . ." without more preclude the issuance of an injunction by an equity court.

However, the holding of the court below is buttressed by numerous decisions of this court and by the practicably intolerable results which would flow from any other decision.

We shall discuss these briefly.

Under circumstances almost identical with the question here presented this Court has not found Equity Courts empowered to supply remedies withheld by Congress

Although Section 15(7) is, as the Court below says, "a model of clarity" and quite explicit in its terms, it may be contended the statute is incomplete in one respect and thus leaves an area in which equity courts might assert jurisdiction. Section 15(7) provides that rates may be suspended ". . . but not for a longer period than seven months . . ." and that if the Commission has

not acted within the period of suspension, the proposed rate

> "... shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified."

No remedy is found in Section 15(7) itself where there is a proposed reduced rate which might later be held unlawful. But this apparent gap is illusory; by Section 8 of the Interstate Commerce Act, Congress has provided in its legislative wisdom what the courts must accept as a proper remedy, and what is in fact that.

However, even in the absence of availability of such relief this court has tolerated an hiatus between the relief available under the motor carrier part of the Interstate Commerce Act and that available from the courts. In *T.I.M.E. Inc.* v. *U.S.*, 359 U.S. 464, the Court held that a shipper had no remedy either before the Commission or in the equity courts for exaction of an unreasonable rate on past truck shipments. Of particular significance were the remarks of the Court with respect to the circumstances obtaining after expiration of the seven months suspension period,

> "... Thus although under the statutory scheme it is possible that a shipper will for a time be

> forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the I. C. C. has acted on the challenge, it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative 'lag' ". (359 U.S. at 480.)

There is no record of an Equity Court having ever granted injunctive relief at this stage of a suspension proceeding although there have been frequent opportunities to do so

Section 15(7) has been in the statutes in its present form since March 4, 1927 (47 Stat. 1447). No court of equity has ever interfered at this stage of any suspension proceeding.

There has been no lack of opportunity. More than half of all the rail suspension cases processed by the Interstate Commerce Commission are still pending when the statutory suspension period expires. Sometimes the carriers voluntarily further postpone the effective date, but many times they do not and the rates become effective.

We reiterate, the problems presented here arise frequently in the administrative process. The same situation pertains in more than half the suspension cases involving railroad rates and yet the petitioners cite only two cases in 35 years in which an equity court undertook to interfere with the administrative process. And even these cases—although we think they were decided erroneously—are clearly distinguishable from the circumstances here.

In *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955) the Interstate Commerce Commission hearings had been held, briefs had been filed, oral argument had been heard and the Commission had *acted*.

The injunction was issued to stay effectiveness of the rates *after* the Commission's decision, but before a formal petition for reconsideration had been filed. It would appear from a careful reading of the court's opinion that it is highly problematical whether the injunction would have been issued even at this stage except for the fact the Commission did not serve its order on the protesting parties in sufficient time to permit the filing of a petition for reconsideration before the effective date of the rates.

Furthermore, it must be recognized that this decision was rendered not by a Circuit Court of Appeals, but by a three-judge court and because the decision on this issue soon became moot, it was never reviewed by a higher court.

The circumstances in *Cantlay & Tanzola, Inc.* v. *U. S.*, 115 F. Supp. 72 (S.D. Cal. 1953) were similar to those in *Pacific Inland, supra.* Here again the Commission had made findings after investigation as to the lawfulness of the suspended rate and, except for reconsideration, the administrative process had been completed. Here again the question of the propriety of the injunction became moot and was not reviewed.

Injunctive relief at this stage of a suspension proceeding would create serious problems leading to the breakdown of the administrative process

Before this Court entertains any thoughts that equity courts may enjoin the effectiveness of rate changes beyond the seven months period provided by the statute, it should give grave consideration to the result not only in this case but in numerous similar proceedings which arise from day to day.

If an injunction is issued, how long does it continue in effect?

Obviously, if the injunction is to produce the results sought by the petitioners, there can be only two answers to this question, and neither is satisfactory.

First, the Court might maintain the injunction until the Commission decided the case, thus going directly in the face of the plain words of the statute and extend the suspension period indefinitely.

And how long might this be?

Less than half the investigation and suspension cases involving railroad rates are processed to a conclusion by the Interstate Commerce Commission within the statutory suspension period. Many cases require far more than seven months to decide. Investigation and Suspension Docket 4208 involved rates on grain to and within the South, filed to become effective June 1, 1936. The decision was not handed down until February 1, 1945, although in the meantime interim rates were permitted to become effective (259 I.C.C. 629).

In Investigation and Suspension Docket 6867 reduced rates on tobacco from the South to the North, scheduled to become effectilve January 15, 1958, were held under suspension until the Commission's decision on January 11, 1960. *Tobacco from N. C. to Central Territory*, 309 I.C.C. 347.[3] Relieved of pressure the

[3] See also, *e.g.:*

I & S 6981, *Coal from Kentucky, Virginia, and West Virginia to Virginia*. 308 I.C.C. 99; suspended July 28, 1958; decided July 13, 1959.

I & S 7552, *Soda Ash, Baton Rouge, Louisiana to Savannah, Georgia;* suspended March 11, 1961; still pending December 1, 1962.

I & S 7583, *Cement in Carloads 140,000 Pound Minimum Within SFA Territory;* suspended May 15, 1961; still pending December 1, 1962.

Commission might take even longer to make its decisions and thus deprive the public of the benefits of technological advances and lower cost transportation.

The other answer to the question is that the Court might simply decide the case on its merits and either dissolve the injunction or make it permanent; but this Court has over the years repeatedly, consistently and meticulously refrained from interfering with the administrative process until it has been completed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *cf. United States* v. *Illinois Cent. R. Co.*, 291 U.S. 457, 463; *Delaware & Hudson Co.* v. *United States*, 266 U.S. 438, 448-449.

Injunctive relief at this stage of a suspension proceeding can be viewed only as interference with the administrative process

The petitioners have undertaken to persuade the courts below that invasion of this area would be in furtherance of the administrative process. The opposite is true. All the petitioners want, either from the administrative process or elsewhere, is to prevent the respondents from making the rates effective. Under the administrative process they become effective at the end of the suspension period. Therefore any action the courts take is a direct interference with and usurpation of administrative action.

Inevitably the exercise of judicial power at this stage injects the courts into the rate regulation process prematurely. A court would not act solely on basis of the Commission's tentative findings in its *pro forma* suspension order and thereby shut the carrier off from presenting any disputed facts—facts which might already be of record in the uncompleted Commission

proceeding. Unavoidably, therefore, the court would have to make its own findings as to the probable lawfulness of the suspended tariff and this can be viewed only as usurpation of the administrative function which this Court has consistently refused to condone.

In both the *T.I.M.E. case supra* and the recent decision in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 31, U.S. Law Week 4015 (decided Nov. 19, 1962) this Court recognized that such judicial interference jeopardizes the stability and equity of the rate structure.

Conclusion

The issue here is narrow. The question before the court is not whether an injunction *should* be issued, but whether one *might* be issued if it should be found warranted. Nevertheless, the record before this court and the pleadings of the petitioners deal with the merits of the injunctive relief requested and we therefore feel constrained to remark only briefly on this aspect.

Petitioners would have the court believe the circumstances in this case are like those in other struggles between barge lines and railroads which have been before this court in *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), aff'd per curiam, 361 U.S. 353 (1960); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D.Kan. 1961); *American Barge Line Co.* v. *Alabama G.S.R.Co.*, 306 I.C.C. 167, 174 (1959); and *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

This is not correct. In these cases dealing with the struggle between these two modes of transport there has always been involved one of these two propositions:

Either (1) railroads undertook to make a special low point-to-point rate departing from their normal basis of rates on the same commodity in the same territory solely for the purpose of capturing traffic from the barge line, or (2) the railroads refused to accord the barge lines as connecting carriers similar treatment to that accorded connecting railroads.

Neither of these conditions is here present.

The respondents are seeking to establish rates made on precisely the same basis whether the origin or the destination is a river port or an inland point far removed from the river. Under this proposal the railroads would treat our southern producers, processors and consumers equitably regardless of where they are located.

What the petitioners are trying to do is to deprive a consumer of grain at Orangeburg, South Carolina of a reduced rate on grain moving direct by railroad from Evansville, Indiana, so that they may force the movement over the longer and more expensive route using the river to Guntersville, Alabama, and unregulated trucking beyond (R. 36).

These parties respectfully submit that in the balancing of equities, the interest of the vast majority of the southern producers and processors and the interest of all the southern consumers of grain must be accorded the fullest weight. To issue the injunction here sought would not only deprive the general public in the South of rate relief to which it is entitled, but would create intolerable uncertainties in the marketing of grain and in the planning of grain processors and poultry and livestock producers.

WHEREFORE, the State of Georgia, Georgia Public Service Commission, Southeastern Association of Railroad & Utilities Commissioners and Southern Governors' Conference pray that this court affirm the decisions of the courts below.

Respectfully submitted,

SOUTHERN GOVERNORS CONFERENCE
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